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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 1023

CITY NATIONAL BANK AND TRUST COMPANY OF COLUMBUS,
Administrator w/w/a of the Estate of Bess M. Kelly, deceased,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

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No.

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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

Petitioner, City National Bank and Trust Company of Columbus, administrator with the will annexed of the Estate of Bess M. Kelly, deceased, by its counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on January 23, 1963, affirming the judgment of the United States District Court for the Southern District of Ohio.

I. OPINIONS BELOW.

The opinion of the Court of Appeals, filed on January 23, 1963, is reported at 312 F. 2d 118, and is appended to this petition as Appendix A (*infra*, pp. 19-20). The Opinion, Findings and Order of the District Court, filed March 7, 1962, is reported at 203 F. Supp. 398.

II. JURISDICTIONAL STATEMENT.

The judgment of the Court of Appeals was entered on January 23, 1963 (Appendix B, *infra*, p. 21). A petition for rehearing was filed on February 11, 1963, and denied by order entered on February 18, 1963 (Appendix C, *infra*, p. 21). The jurisdiction of this Court is invoked under 28 U. S. C., section 1254. The Court of Appeals had jurisdiction under 28 U. S. C., section 1291. The District Court had jurisdiction under 28 U. S. C. section 1346(a)(1).

III. QUESTIONS PRESENTED.

A. Where the will of a testatrix establishes a trust under the terms of which all the trust estate is to pass to designated charities if the testatrix's son dies before the age of 45, leaving neither wife nor child surviving him, is the estate of the testatrix entitled to a deduction, for purposes of the federal estate tax, where the son dies, without wife or child, 80 days after the death of the testatrix, and the entire trust estate passes to the designated charities within the period for filing the federal estate tax return and before the son receives, or is entitled to receive under the terms of the will, any part of the principal or income of the trust?

B. Did the death of the son, in the circumstances above recited, constitute an "irrevocable disclaimer," within the meaning of that term in section 812(d) of the Internal Revenue Code of 1939, which provides, *inter alia*, that an estate is entitled to a deduction for any bequest which falls to a charity as a result of an irrevocable disclaimer, if the disclaimer is made before the date prescribed for filing the federal estate tax return?

C. After the death of the testatrix, the pertinent statute was amended to provide that the complete termination, before the date prescribed for the filing of the estate tax return, of a power to consume or appropriate property for the benefit of an individual, by reason of the death of the individual or for any other reason, shall be considered an irrevocable disclaimer of a power to consume or appropriate property for the benefit of such individual. Was it proper for the lower court, in interpreting the meaning of the statute, to disregard the legislative history of the amendment, which showed that the amendment was designed to clarify and not to change existing law?

IV. STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set out in Appendix D (*infra*, pp. 22-27).

V. STATEMENT OF FACTS.

The case was submitted to the District Court upon a stipulation of facts which that Court adopted as its findings of fact.

The petitioner (sometimes hereinafter referred to as "administrator") is the duly qualified and acting administrator with the will annexed of the Estate of Bess M. Kelly, deceased. The administrator brought this action pursuant to 28 U. S. C., section 1346, for the recovery of federal estate taxes paid by the estate in the amount of $241,342.01, plus interest from the dates of payment.

Bess M. Kelly died, testate, a resident of Franklin County, Ohio, on November 24, 1952. By Item XI of her last will and testament, she bequeathed her residuary estate in trust and named the administrator as trustee.

The net income of the trust was to be accumulated and added to the principal of the trust until her adopted son, Dennis R. Kelly, reached the age of 21. Thereafter, and until the trust terminated, the son was to receive, out of the principal or income of the trust, $5,000 per year, and such additional sums as he might request and the trustee in its absolute discretion deemed necessary for his support and maintenance in accordance with his station in life.

Upon the son reaching the age of 45, the trust was to terminate, and all the property comprising the trust estate was then to be distributed to him outright. However, if the son died before reaching the age of 45, the trust was to continue for the benefit of the son's surviving wife, child, or children. All of the trust's provisions which would have been applicable to the son had he lived, were to apply to each of these trust beneficiaries and, upon the date that the son would have reached the age of 45, the trust was to terminate and the property was to be distributed equally among the wife, child, or children.

Item XII of Bess M. Kelly's will provided that if her son should die before reaching the age of 45, leaving neither wife, nor child, nor children surviving him, the trust referred to in Item XI of her will was to terminate and the property thereof was to be distributed equally to six enumerated beneficiaries, all of which were organized and operated exclusively for the religious, charitable or educational purposes described in section 812(d) of the Internal Revenue Code of 1939.

On February 12, 1953, 80 days after the death of the testatrix, her son, Dennis R. Kelly, died, intestate, at the age of 20, unmarried, leaving neither wife nor child, surviving him. By reason of the son's death during his minority and during the administration of the estate, no

part of the principal or income of the trust was ever distributed to him or his estate. Instead, after the payment of specific legacies and proceeds, the residue of the estate (less debts, funeral and administration expenses, death taxes and $5,000 reserved for the costs and expenses of this action) was distributed to the charities specified in Item XII of Bess M. Kelly's will.

On both the original and amended estate tax returns filed on behalf of the estate of Bess M. Kelly, an election was made to value the property of the estate as of the date one year after the date of the death of the testatrix, pursuant to section 811(j) of the Internal Revenue Code of 1939.

No charitable deduction was claimed on either return for the amounts distributed to the six charities but statements attached to the returns indicated that the tax liabilities were disputed and that claims for refund would be filed. Timely claims for refund were filed and denied, and the administrator then timely brought this action in the District Court for the recovery of estate taxes in the amount of $241,342.01, plus interest.

The District Court concluded that the estate tax is determined as of the date of testatrix's death, citing this Court's decision in *Ithaca Trust Co. v. United States*, 279 U. S. 151. It also concluded that the death of the son within the period for filing the federal estate tax return did not constitute an "irrevocable disclaimer" of his bequest, within the meaning of section 812(d) of the Internal Revenue Code of 1939, at the same time conceding that "death has the same effect as an irrevocable disclaimer." Accordingly, the District Court entered judgment in favor of the respondent.

The Court of Appeals, in a brief "*per curiam*" opinion, affirmed the judgment of the District Court (Appendix A, *infra*, pp. 19-20).

VI. ARGUMENT.

The federal estate tax is imposed upon the transfer of the decedent's net estate, pursuant to section 810 of the Internal Revenue Code of 1939[1] (Appendix D, *infra*, p. 22), and is measured by the value thereof. The value of the net estate is determined by deducting from the value of the gross estate as defined in section 811 (Appendix D, *infra*, p. 22) those items specified in section 812 (Appendix D, *infra*, pp. 22-23). Insofar as here relevant, section 812 provides for the deduction of:

> (d) *Transfers for Public, Charitable and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return) to or for the * * * use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes. * * *

A. The Holding of the Court Below Is in Conflict With the Rule Followed in Other Circuits, and Presents an Important Question of Federal Law Which Should Be Settled by This Court.

The decision below reflects the widespead confusion and uncertainty that now exists among lower courts and administrative tribunals as to the scope and effect of this Court's decision in *Ithaca Trust Co. v. United States, supra.*

In *Ithaca Trust Co.*, the testator gave his estate to his wife for life, the residue to charities. The value of the

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[1] Hereafter all section references are to the Internal Revenue Code of 1939, unless otherwise stated.

charitable remainder depended upon how long the wife would live after her husband, since the longer the duration of the life estate the less was the present value of the remainder. The widow died within a year of her husband's death, before she had reached the end of her actuarially computed life span. The husband's estate claimed a charitable deduction in an amount computed upon the basis of the widow's actual life; the Commissioner of Internal Revenue contended the deduction should be limited to the lesser amount computed actuarially. The Court, through Justice Holmes, held that the value of the widow's life interest must be estimated by the mortality tables, stating, at page 155:

> "The estate so far as may be is settled as of the date of the testator's death."

The respondent contended below, and the District Court and Court of Appeals agreed, that under the rule of the *Ithaca* case, a bequest to charity must be assured in fact, *as of the instant of the decedent's death*, if it is to be deductible. The Court of Appeals did not attempt, in its opinion, to square its holding with decisions in other circuits which construe the *Ithaca* rule with much more elasticity.

Thus, in *Commissioner v. Shively's Estate*, 276 F. 2d 372 (1960), the United States Court of Appeals for the Second Circuit held (over the vigorous dissent of Judge Moore who contended the *Ithaca* rule was being flouted) that events which occurred subsequent to decedent's death but before the filing of the federal estate tax return should be taken into account in determining the amount of deductions to which an estate was entitled under section 812(b)(3) of the 1939 Internal Revenue Code. The majority opinion acknowledged (pp. 374-375) that the

Shively decision was in conflict with the decisions of the Seventh Circuit, in *Commissioner v. Strauss*, 77 F. 2d 401, 405 (1935); the decision of the Ninth Circuit in *Smyth v. Erickson*, 221 F. 2d 1, 3 (1955); and the decision of the United States District Court for the Southern District of New York in *Winer v. U. S.*, 153 F. Supp. 941 (1957). Judge Moore pointed out in his dissenting opinion that the Tax Court, whose decision was reversed, had applied the "date of death" test, in reliance primarily upon *Ithaca* and upon the prior Tax Court decision in *Estate of Pompeo M. Maresi*, 6 T. C. 582, which the Second Circuit had affirmed, 156 F. 2d 929 (1946).

Since its reversal in the *Shively* case, the Tax Court has been quite liberal in taking into account post-death events for the purpose of determining the amounts of deductible claims against estates. See *Estate of Mary Redding Shedd v. Commissioner*, 37 T. C. 394 (1961); and *Reginald L. Taylor*, 39 T. C. No. 33 (1962).

Although the petitioner urged the *Shively* decision upon the court below, there was no mention of the case in its opinion. Instead, the lower court relied upon a line of Courts of Appeals decisions, such as *Cox v. Commissioner of Internal Revenue*, 297 F. 2d 36 (2nd Cir. 1961); *Burdick et al. v. Commissioner of Internal Revenue*, 117 F. 2d 972 (2nd Cir. 1941), cert. denied, 314 U. S. 631; *First Trust Co. of St. Paul State Bank v. Reynolds*, 137 F. 2d 518 (8th Cir. 1943); and *Estate of Charles J. Barry, deceased, etc. v. Commissioner*, 311 F. 2d 681 (9th Cir. 1962), which have denied charitable deductions in instances where a testator left his estate to a legatee or trustee, who in turn, was authorized to make a distribution of the property to a charity if the legatee or trustee, in his discretion, thought such disposition was proper. The whole point of these cases is that if a bequest to a

charity is to be deductible, the testator himself, and not a third party, must make the bequest. The cases upon which the lower court relied are a far cry from the present case where the charities took by virtue of an express command in the will of the testatrix—and not by reason of the exercise of discretion by a legatee or trustee.

The present decision is also in conflict with the decision of the United States Court of Appeals for the Second Circuit in *Marine Midland Trust Company of Southern New York v. McGowan*, 223 F. 2d 408 (1955). There, the Second Circuit allowed a deduction for a charitable bequest to a corporation which was not even in existence at the death of the testator. The court, therefore, must have taken into consideration the post-death event of the formation of the corporation in order to allow the deduction. The court stated that section 812(d) should be construed to cover the transfer of property from an estate to a charity through a medium of an intervening trust which held bare legal title until the beneficial owner was determined. The decision in *Marine Midland Trust Company, supra*, is particularly apropos here. No beneficiary was eligible to take any part of the residuary estate of Bess M. Kelly until one of the following events occurred: either (a) Dennis R. Kelly reached the age of 21 years when he was to receive the income from the trust, or (b) Dennis died leaving neither wife nor child surviving him. Until one or the other of these events occurred, the trust properties were being held by the executor of the estate of Bess M. Kelly either for distribution to Dennis or for distribution to the charities. Dennis having died before he reached 21, without wife or child, the property passed to the charities from Bess M. Kelly, through her personal representative, who held as an intervening stakeholder. Certainly, if the post-death formation of a corporation,

which is of a volitional nature, may be considered in determining whether a charitable deduction is allowable, a supervening death eighty days after the death of a testator may not be ignored.

The present decision is also in conflict with the decision of United States Court of Appeals for the Second Circuit in *Commissioner v. Macaulay's Estate*, 150 F. 2d 847 (1945). There, the Second Circuit allowed a deduction for a bequest to a charity which fell into the residue of the estate, as a result of a disclaimer of a specific bequest, and thereby passed to charities. The significance of the *Macaulay* decision is that the death of the testatrix occurred before the disclaimer provision was added to section 812 (d), in 1942; and consequently the decision did not turn upon the efficacy of the disclaimer amendment. The Second Circuit, speaking through Judge Augustus Hand, found that, entirely without the aid of the amendment, the disclaimer (obviously a post-death event) could be taken into consideration to determine whether the estate was entitled to the charitable deduction. Judge Hand concluded, after an enlightening discussion of the legislative history of the 1942 amendment, that it was declaratory of the original statutory intent and did not create any new rights. This legislative history will be adverted to again when we discuss the question whether the death of Dennis R. Kelly, within the period for filing his mother's estate tax return, did, in fact, constitute a disclaimer within the meaning of the 1942 amendment. Our point here, at present, is that under the *Macaulay* decision, even if the disclaimer provision should be read out of the statute, the death of Dennis, within the period prescribed for filing his mother's estate tax return, is a relevant factor in determining whether her estate is entitled to the charitable deduction.

The United States Courts of Appeals for the Second and Third Circuits have also held that post-death settlements of contests between the relatives of a decedent and charitable beneficiaries under decedents' wills should be regarded in the determination of charitable deductions. Typical of these cases is *In re Sage's Estate*, 122 F. 2d 480, (3rd Cir. 1941), where there was a residual bequest to a charity which was later reduced by the amount paid to the decedent's wife in settlement of a will contest. It was held that only the net amount received by the charity was deductible. The court stated at page 484:

> "* * * while a decedent's gross estate is fixed as of the date of his death, deductions claimed in determining the net estate subject to tax may not be ascertainable or *even accrue until the happening of events subsequent to death* * * *." (Emphasis added.)

To the same effect are *Irving Trust Company v. United States*, 221 F. 2d 303, (2nd Cir. 1955); and *Thompson's Estate v. Comm'r.*, 123 F. 2d 816 (2nd Cir. 1941).

In *Commissioner v. Sternberger*, 348 U. S. 187, this Court denied a deduction for a charitable bequest which was on condition that an unmarried woman, aged 27, would die without issue. While the court below did not cite *Sternberger* in support of its decision, the respondent argued below that *Sternberger* stood for the proposition that a charitable bequest conditional in form at the time of death is never deductible. However, the United States Court of Appeals for the First Circuit has not read the *Sternberger* decision in that light. At page 28 of its opinion in *United States v. Dean*, 224 F. 2d 26, the First Circuit stated that, in the *Sternberger* case, this Court "rested its reversal on the ground that the actuary was unable to cope with the contingencies of that particular case" and not "on

the broad proposition that charitable bequests which at the decedent's death are not assured but are in fact conditional are never deductible." In both *Sternberger* and *Humes v. United States*, 276 U. S. 487, a case similar to *Sternberger*, the life tenants were living during and long after the period of administration of the estates and no event had as yet occurred which fixed the right of the charities to take. In the present case, the life tenant died 80 days after the life of the testatrix and the right of the charities to their bequests was thus fixed before the date for filing the estate tax return. Moreover, as was pointed out in the *Sternberger* opinion (at page 87), the life tenant in that case had a continuing substantial inducement ($2,000,000) to marry and leave a descendant. In the present case, before the end of the administration period, the life tenant had irretrievably lost any right he may have had, by voluntary action, to defeat or divert the charitable bequest. There was thus in both the *Sternberger* and *Humes* cases a continuing element of volition that could defeat the charitable bequests, which is not present in the case at bar. Cf. *Dean v. United States*, *supra* at page 28.

The tenor of most of the opinions that have considered the question is that there was no intent in *Ithaca* to lay down an inflexible rule that the estate tax is finally and irrevocably fixed at the moment of death. This Court has said as much in *Helvering v. Safe Deposit & Trust Company of Baltimore*, 316 U. S. 56, at page 65:

> "* * * It is urged that taxes should not be influenced by what occurs after the taxable event; that it is reasonable to consider a compromise *preceding* the receipt of income in connection with an income tax; but that a compromise occurring *after* the decedent's death, which is the 'taxable event' under an estate tax,

should not be considered. Whatever may be the general rule in this respect, (see *Ithaca Trust Co. v. United States*, 279 U. S. 151, 155, 73 L. ed. 647, 650, 49 S. Ct. 291) this Court has clearly recognized in *Helvering v. Grinnell*, 294 U. S. 153, 79 L. ed. 825, 55 S. Ct. 354, that events subsequent to the decedent's death, events controlled by his beneficiaries, can determine the inclusion or not of certain assets within the decedent's gross estate under sec. 302(f). * * *" (Emphasis the Court's.)

The decision below is out of harmony with a substantial segment of judicial authority, and presents an important and frequently recurring question of federal law, which, it is respectfully submitted, should be settled by this Court.

B. The Death of Dennis R. Kelly, at the Age of 20, Without Wife or Child Surviving Him and Before Any Portion of the Principal or Income of the Trust Had Been Paid to Him or to His Estate, Constituted an "Irrevocable Disclaimer" of his Bequest, Within the Meaning of Section 812(d) of the Internal Revenue Code of 1939.

Section 408(a) of the Revenue Act of 1942 added to section 812(d) the parenthetical language which states that any interest which falls into a charitable bequest as a result of an irrevocable disclaimer of a bequest, or power, shall be deductible, if the disclaimer is made prior to the date prescribed for the filing of the federal estate tax return. The legislative history of the disclaimer amendment is set out rather fully in *Commissioner v. Macaulay, supra*. Petitioner will merely set forth at this point the following excerpt from the Report of the House Committee on Ways and Means recommending passage of the amendment (H. Rep. No. 2333, 77th Cong. 2nd Sess., pp. 166, 167):

"Section 408. Deduction for Disclaimed Legacies Passing to Charities.

"Under existing law a deduction for a bequest, legacy, devise, or transfer for charitable and related purposes within the meaning of section 812(d) or 861(a)(3) of the Code is not allowable to the extent that the decedent empowers another to divert such bequest, legacy, devise, or transfer to another purpose. Moreover, it is not clear whether a deduction of the value of the residuary estate bequeathed or devised for charitable and related purposes includes an amount disclaimed by a specific beneficiary and therefore falling into the residuary estate. In both cases a deduction should be allowed in the full amount passing for charitable and related purposes if the disclaimer of the power or of the specific bequest or devise is prompt. This section therefore amends sections 812(d) and 861(a)(3) to assure this result, if there is an irrevocable disclaimer prior to the date prescribed for the filing of the estate tax return. Under the regulations this date occurs 15 months after the date of death of the decedent. A disclaimer is a complete refusal to accept the rights to which one is entitled. If the beneficiary uses these rights for his own purposes, as by receiving a consideration for his formal disclaimer, he has not refused the rights to which he was entitled. There can be no disclaimer after an acceptance of such rights, expressly or impliedly.

"The amendment made by this section is applicable to estates of decedents dying after February 10, 1939, that is, all estates subject to the provisions of the Code."

The death of Dennis was, in point of fact, a disclaimer which met all the requirements set out in the Committee Report. His death, by virtue of the express terms of his mother's will, constituted a complete refusal or rejection of the residuary bequest and of any power which he or the

trustee possessed to use or consume the principal of the trust for his benefit. It was obviously "irrevocable" since there is nothing more irrevocable than death. There was, moreover, no acceptance of any benefit from the residuary estate prior to the time of Dennis' death, because, by the terms of the will, nothing could be paid to Dennis until he reached 21, and he died before reaching that age.

The legal question whether the disclaimer amendment is operative in circumstances such as those presented by this case, has never, to the best of petitioner's knowledge, been considered by any other United States Court of Appeals or by this Court.

We respectfully submit that the death of Dennis was a disclaimer within the meaning of the 1942 amendment. A contrary interpretation would lead to the grotesque result that Congress intended to allow a charitable deduction where a formal written document of disclaimer was executed within the period for filing the estate tax return and to deny a charitable deduction where, within the same period, the bequest had actually passed to the charities through the occurrence of an event with all the finality of death.

C. The Lower Court Violated the Rule of Statutory Interpretation Laid Down by This Court in Commissioner v. Bilder, 369 U. S. 499, in Failing to Consider the Legislative History of the 1954 Amendment to the Pertinent Statute.

Under Item XI of the testatrix's will both the life tenant and the trustee had the power to consume or appropriate the trust property for the benefit of the life tenant.

The testatrix died in the year 1952. In the year 1954, at the time of consideration of the Internal Revenue Code of 1954, Congress added the following sentence to section

2055(a) of the Internal Revenue Code (the present counterpart of section 812(d) of the 1939 Code):

> "For purposes of this subsection, the complete termination before the date prescribed for the filing of the estate tax return of a power to consume, invade, or appropriate property for the benefit of an individual before such power has been exercised by reason of the death of such individual or for any other reason shall be considered and deemed to be an irrevocable disclaimer with the same full force and effect as though he had filed such irrevocable disclaimer."
>
> (Aug. 16, 1954, c. 736, 68 A Stat. 390.)

This sentence was inserted in the bill on the floor of the Senate, and the only legislative history bearing on the purpose of the addition is found in the statement of its proponent, Senator Martin (Congressional Record, July 1, 1954, p. 9088):

> " 'Mr. Martin. Section 2055, which corresponds to Section 812(d) of the Internal Revenue Code of 1939, allows an estate tax deduction for bequests, legacies, devises, or transfers to recognized charitable organizations. The courts have held that where a decedent leaves property in trust to pay income to an individual for life and gives the individual or a trustee a power to use principal for the benefit of such individual, the existence of the power defeats the charitable deduction. However, Section 812(d) of the 1939 Code was amended by the Revenue Act of 1942—Section 408(a)—to provide for allowing the charitable deduction in such cases if, before the due date of the estate tax return—15 months after the date of death—there is an irrevocable disclaimer of the power to use principal.
>
> " 'The report of the Senate Finance Committee on the revenue bill of 1942—Senate Report No. 1631, 77th Congress, 2d Session, page 240—indicates an intention to allow the charitable deduction if the power

to use principal is completely terminated before the due date of the estate tax return, especially where before that date the property is distributed to charitable organizations. The Internal Revenue Service appears to take the position that if an individual is given a power to use trust principal and such individual dies within a short time after the death of the decedent—who created the trust—without signing a paper disclaiming the power, the deduction is not allowable, even though the property is in fact distributed to charitable organizations before the due date of the return. *Apparently, it is the position of the revenue service that even though the death of the individual beneficiary cuts off the power and makes it certain that all the property will go to charitable organizations, there can be no deduction unless such individual prior to death signed a written document purporting to disclaim the power. This is an inequitable result, especially in a case where the individual beneficiary is in such bad health that it is not possible to attend to legal matters prior to death. It is doubtful that such result was intended when the law was amended in 1942.*

" '*The amendment would make it clear* that the property qualifies for the charitable deduction if the power to use principal for the benefit of an individual beneficiary is completely terminated before the due date of the estate tax return.' " (Emphasis added.)

This Court held, only last year, in *Commissioner v. Bilder*, 369 U. S. 499, that where a statute is susceptible to different constructions, its true meaning must be ascertained on the basis of its legislative history. The only legislative history extant as to the purpose of the 1954 addition to the disclaimer provision is that quoted above; and it shows that the intent of the amendment was to clarify, not to change, existing law. In failing to consider this legislative history, the lower court violated the *Bilder* rule.

The decision of the lower court runs counter to the decision of the United States Court of Appeals for the Seventh Circuit in *Sicanoff Vegetable Oil Corporation v. Commissioner*, 251 F. 2d 764 (1958), where that court, after looking at the legislative history of a definition of personal holding company income which was added to the Statute by the Internal Revenue Code of 1954, concluded that the purpose of the amendment was to clarify rather than change the meaning of the 1939 Internal Revenue Code.

CONCLUSION.

For the foregoing reasons, the Court should issue a writ of certiorari so that the important practical questions of federal law which this case presents may be finally determined, and the conflict between the decision of the lower court and the decisions of the Courts of Appeals in other circuits may be resolved.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided January 23, 1963.)

Before: CECIL, Chief Judge, MILLER and SMITH,* Circuit Judges.

PER CURIAM. The appellant, City National Bank and Trust Company of Columbus, Ohio, is the duly qualified and acting administrator w/w/a of the Estate of Bess M. Kelly, deceased. The Bank brought this action against the United States in the District Court for the Southern District of Ohio, Eastern Division, for the recovery of federal estate taxes in the approximate amount of $241,000 paid by the Bank for the estate of Bess M. Kelly.

The sole question presented is whether the administrator was entitled to deduct the amount of certain contingent bequests to charities from the value of the estate for the purpose of determining the net estate subject to federal estate tax. The determination of this question turns upon the interpretation of Section 812(d) of the Internal Revenue Code of 1939.

The facts are fully stated in the Findings of Fact, Discussion and Conclusions of Law of the District Judge reported in *City National Bank and Trust Company of Columbus, Administrator, etc. v. United States of America*, 203 F. Supp. 398.

Briefly stated, the bequest to the residuary legatee of the decedent, Bess M. Kelly, failed because of his death before the bequest took effect as to him and within the time for filing the estate tax return. As a result of the legatee's death, the residuary estate passed to six named contingent beneficiaries, all of which were organized and

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* United States Circuit Judge, Second Circuit, sitting by designation.

operated exclusively for religious, charitable or educational purposes, within the meaning of Section 812(d) of the Internal Revenue Code of 1939.

The District Judge determined, and we think correctly, that under the facts of this case there was no transmission of property from the decedent to the named beneficiaries which qualified for the claimed deduction. The amount passing to the charities did not become certain until the date of the residuary legatee's death and they were not entitled to any specific and ascertainable amounts at the time of the death of the testatrix.

This question has been before the courts in varying ways on numerous occasions. The tenor of the opinions in these cases is that the estate tax is determined at the time of death and the charitable bequests must be definite in ascertainment and not subject to some contingency, the happening of which is uncertain. *Ithaca Trust Co. v. United States*, 279 U. S. 151; *Y. M. C. A. v. Davis*, 264 U. S. 47; *Cox v. Commissioner of Internal Revenue*, 297 F. 2d 36, C. A. 2; *Burdick et al. v. Commissioner of Internal Revenue*, 117 F. 2d 972, C. A. 2, cert. denied, 314 U. S. 631; *First Trust Co. of St. Paul State Bank v. Reynolds*, 137 F. 2d 518, C. A. 8; *Mississippi Valley Trust Co. v. Commissioner of Internal Revenue*, 72 F. 2d 197, C. A. 8; *Estate of Charles J. Barry, deceased, etc. v. Commissioner*, F. 2d , C. A. 9 (Docket No. 17087, 12/3/62), 63-1 USTC par. 12122.

The contention of the appellant that the death of the residuary legatee constituted a disclaimer of the bequest to him in accordance with the pertinent section of the 1939 Revenue Code is without merit.

We conclude that the District Judge correctly interpreted Section 812(d) of the Code as applicable to the facts in this case and that the Judgment of the District Court should be affirmed.

APPENDIX B.

JUDGMENT.

(Filed January 23, 1963.)

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ LESTER L. CECIL,
Chief Judge.

APPENDIX C.

ORDER.

(Filed February 18, 1963.)

This case is before the Court upon a petition of the appellant for rehearing.

Upon consideration, the Court finds that it raises no new questions warranting reconsideration of the case on its merits and that it should be and it is hereby denied.

s/ LESTER L. CECIL,
Chief Judge, United States Court of Appeals, Sixth Circuit.

APPENDIX D.

STATUTES AND REGULATIONS.

Internal Revenue Code of 1939:

Sec. 810. RATE OF TAX.

A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title.

* * * * *

(26 U. S. C. 1952 ed., Sec. 810.)

Sec. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(26 U. S. C. 1952 ed., Sec. 811.)

Sec. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

(a) *Exemption.*—An exemption of $100,000;

(b) *Expenses, Losses, Indebtedness, and Taxes.*—Such amounts—

(1) for funeral expenses,

(2) for administration expenses,

(3) for claims against the estate, * * *

* * * * *

(d) [as amended by Sec. 408(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return) to or for the * * * use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * * * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 812.)

Internal Revenue Code of 1954:

Sec. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.

(a) IN GENERAL.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—

* * * * *

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of

the activities of which is carrying on propaganda or otherwise attempting, to influence legislation;

* * * * *

For purposes of this subsection the complete termination before the date prescribed for the filing of the estate tax return of a power to consume, invade, or appropriate property for the benefit of an individual before such power has been exercised by reason of the death of such individual or for any other reason shall be considered and deemed to be an irrevocable disclaimer with the same full force and effect as though he had filed such irrevocable disclaimer.

Treasury Regulations 80 (1937 ed.):

Art. 47. *Conditional bequests.* If the transfer is dependent upon the performance of some act or happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequested, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from the exercise of such power.

Treasury Regulations 105 (1939 Code):

Sec. 81.44 [As amended by T.D. 5239, 1943 Cum. Bull. 1081; T. D. 5351, 1944 Cum. Bull. 579; T. D. 5906, 1952-1 Cum. Bull. 155][10] *Transfers for public, charitable,*

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[10] This section of Regulations 105 was also amended by T. D. 5948, 1952-2 Cum. Bull. 226, in particulars not material here.

religious, etc., uses.—Deduction may be taken of the value of all property transferred by will or by the decedent in his lifetime if in either case the property was transferred (1) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or (2) to or for the use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes.

The amount of the bequest, legacy, devise, or transfer for which a deduction is allowable under the provisions of this section, includes the interest which falls into any such bequest, legacy, devise, or transfer, as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made (1) prior to September 1, 1944, in the case of decedent dying on or before October 21, 1942, the date of the enactment of the Revenue Act of 1942, or (2) prior to the date prescribed for the filing of the estate tax return in the case of a decedent dying after October 21, 1942. The disclaimer must not only be made (1) prior to September 1, 1944, in the case of a decedent dying on or before October 21, 1942, or (2) prior to the date prescribed for the filing of the estate tax return (including such date as may be prescribed in an extension of time granted for the filing of such return) in the case of a decedent dying after October 21, 1942, but must be irrevocable at the time the deduction is allowed. Ordinarily, a disclaimer made by a person not under any legal disability will be considered irrevocable when filed with the probate court. A disclaimer is a complete and unqualified refusal to accept the rights to which one is entitled. Thus, if the beneficiary uses these rights for his own purposes, as by receiving a consideration for his formal disclaimer, he has not refused the rights to which

he was entitled. There can be no disclaimer after an acceptance of such rights, expressly or impliedly. The disclaimer of a power described in this paragraph is to be distinguished from the release or exercise of a power. In the case of the estate of the creator of a power, the release or exercise of the power by the donee of the power in favor of a person or object described in the preceding paragraph does not cause any deduction under this section of the value of the property subject to such power. See section 81.46.

* * * * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * * Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay or deliver the principal to the charitable corporation, or to apply it to a charitable purpose, the present value of the remainder is deductible. * * *

* * * * *

Sec. 81.46 *Conditional bequests.*—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly im-

probable at the time of decedent's death, the deduction is allowable.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequested, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1023

CITY NATIONAL BANK AND TRUST COMPANY OF COLUMBUS, Administrator w w a of the Estate of Bess M. Kelly, deceased, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 14a-22a) are reported at 203 F. Supp. 398. The opinion of the Court of Appeals (Pet. 19-20) is reported at 312 F. 2d 118.

JURISDICTION

The judgment of the Court of Appeals was filed on January 23, 1963. (Pet. 21.) A timely petition for

rehearing was denied on February 18, 1963. (Pet. 21.) The petition for a writ of certiorari was filed on April 16, 1963. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether contingent bequests to specified charities qualify for the estate tax exemption granted by Section 812(d) of the Internal Revenue Code of 1939 when the contingency is satisfied 80 days after the death of the testatrix by the death of the primary beneficiary without issue.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of Sections 810 and 812 of the Internal Revenue Code of 1939 and Sections 81.44 and 81.46 of Treasury Regulations 105 (1939 Code) are set forth in the Appendix, *infra*, pp. 8-11.

STATEMENT

Bess M. Kelly died testate on November 24, 1952. (R. 14a.) By Item XI of her will, she bequeathed her residuary estate in trust. The net income of the trust was to be accumulated until her adopted son, Dennis R. Kelly, reached the age of 21. Thereafter, while the trust continued, the son was to receive $5,000 yearly, plus such further amounts for support and maintenance as the trustee deemed necessary. (R. 11a, 15a.) When the son reached the age of 45, the trust was to terminate and he was to become the owner of the trust property. If he died before the

age of 45, the trust was to continue for the benefit of his surviving wife, child or children. (R. 12a.)

The will also provided that if the son died before reaching the age of 45, leaving neither wife nor surviving child or children, the trust was to terminate and the trust property was to be distributed equally to six enumerated beneficiaries, all of which were organized and operated exclusively for the religious, charitable, or educational purposes described in Section 812(d) of the Internal Revenue Code of 1939. (R. 12a-13a, 15a-16a.)

On February 12, 1953, 80 days after the death of the testatrix, the son, 20 years of age, died intestate leaving neither wife nor child surviving him. The residue of the estate (less certain items not relevant here) was distributed to the specified charities. No part of the trust property was ever distributed to the son or to his estate. (R. 16a.)

In rejecting the claim that the estate was entitled to deductions in the amounts distributed to the charities, the District Court held that the son's death was not, within the meaning of Section 812(d) of the 1939 Code, a "disclaimer" of the bequest made to him and that the charities, being mere contingent beneficiaries, were not entitled to any specific and ascertainable amounts at the time of the decedent's death. (R. 19a-22a.) The Court of Appeals affirmed, *per curiam*. (Pet. 19-20.)

ARGUMENT

The decision below is correct. There is no conflict in decisions and no occasion for review by this Court.

1. In computing the estate tax imposed by Section 810 of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 8), Section 812(d) (Appendix, *infra*, p. 8) allows a deduction for bequests and other testamentary transfers to certain so-called charitable organizations. But no deduction is permitted if the bequest is contingent upon the happening of a future event as of the date of the testator's death—unless the possibility that the charitable organization will not take is so remote as to be negligible. *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 192-194; Section 81.46 of Treasury Regulations 105 (Appendix, *infra*, p. 11). That was not the case here; from the terms of the will and the age of the son at the time of the testatrix's death, it was highly probable that the charities would not take. Under the controlling Regulations, with the single exception of a timely and effective disclaimer by the primary legatee, the situation as of the moment of the testatrix's death governs the deductibility of conditional bequests to charitable organizations. *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 154-155; *Lincoln Rochester Trust Co.* v. *McGowan*, 217 F. 2d 287, 293 (C. A. 2d); *First Trust Co. of St. Paul State Bank* v. *Reynolds*, 137 F. 2d 518 (C.A. 8th); *Mississippi Valley Trust Co.* v. *Commissioner*, 72 F. 2d 197 (C. A. 8th), certiorari denied, 293 U. S. 604; *United States* v. *Fourth Nat. Bank in Wichita, Kan.*,

83 F. 2d 85 (C. A. 10th), certiorari denied, 299 U. S. 575; *Estate of Kirkwood* v. *Commissioner*, 23 B.T.A. 955, 965-966; see also Treasury Regulations 105 (1939 Code), Section 81.44 (Appendix, *infra*, pp. 9-11).

Nor did the son's death constitute a "disclaimer" within the meaning of Section 812(d). That term, in its ordinary and commonly understood sense, connotes an act renouncing or repudiating some interest or property. *Brown* v. *Routzahn*, 63 F. 2d 914, 916 (C. A. 6th), certiorari denied, 290 U. S. 641; Black's Law Dictionary (4th ed., 1951), p. 550; *Crane* v. *Commissioner*, 331 U. S. 1, 6. There was no evidence here that the son contemplated disclaiming the bequest to him while he lived, and his death of course precluded any renunciation. *Brown* v. *Routzahn*, *supra*, p. 916; 4 Page on Wills (3d ed.), Sec. 1407.[1]

2. There is no conflict with other decisions. The cases upon which petitioner relies, in asserting conflict, are inapposite. *Commissioner* v. *Shively's Estate*, 276 F. 2d 372 (C. A. 2d), involved deduction of a claim under Section 812(b) of the 1939 Code which pertains to expenses and claims which may arise after

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[1] The petitioner's reliance (Pet. 15-18) on the last sentence of Section 2055(a) of the 1954 Code is misplaced. That provision refers only to the termination by reason of death or other cause of an unexercised *power* to divert to private uses property bequeathed to charity. Thus, it cannot apply here, where the charities took upon the termination of a private bequest by reason of death. See Lowndes and Kramer, *Federal Estate and Gift Taxes* (1956), p. 360; Casner, *Estate Planning Cases, Statutes, Text and Other Materials* (2d ed., 1960 Supp.), pp. 252-253; 2 Casner, *Estate Planning* (3d ed., 1961), pp. 890-892, fn. 29, pp. 892-893.

the death of the testator and during the administration of the estate. See *Jacobs* v. *Commissioner*, 34 F. 2d 233, 236 (C. A. 8th), certiorari denied, 280 U. S. 603. *Marine Midland Trust Co. of Southern N. Y.* v. *McGowan*, 223 F. 2d 408 (C. A. 2d), involved an unconditional bequest to a charity which the testator believed to be in existence. (Pet. 9-10.) Any uncertainty that the charity in that case would take did not arise from the language of the bequest. The question in *Commissioner* v. *Macaulay's Estate*, 150 F. 2d 847 (C. A. 2d), was whether a disclaimed specific legacy falling into a residuary estate bequeathed directly and unconditionally to charity qualified for deduction. (Pet. 10.) In permitting the deduction, the court relied (*id.* at 851) on cases where a statutory right to take in derogation of a direct bequest to charity had been released or renounced and the only contingency affecting the charitable bequests arose from the questioned efficacy of the will as an instrument of transfer. See *Commissioner* v. *First Nat. Bank*, 102 F. 2d 129, 131 (C. A. 5th); *Humphrey* v. *Millard*, 79 F. 2d 107, 108 (C. A. 2d). The will contest cases relied on by the petitioner (Pet. 11) are based on the same considerations as the statutory right cases and are thus similarly distinguishable from the instant case.

3. No problem of administrative importance is presented by the decision in the instant case. It represents only the application of a well-settled principle of law to a somewhat unusual and non-recurring situation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY, 1963.

APPENDIX

Internal Revenue Code of 1939:

SEC. 810. RATE OF TAX.

A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate * * *.

* * * *

(26 U.S.C. 1952 ed., Sec. 810.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, * * * by deducting from the value of the gross estate—

* * * *

(d) [as amended by Sec. 408(a), Revenue Act of 1942, c. 619, 56 Stat. 949] *Transfers for Public, Charitable, and Religious Uses.* — The amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made prior to the date prescribed for the filing of the estate tax return * * *) to or for the * * * use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. * * * * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 812.)

Treasury Regulations 105 (1939 Code):

> Sec. 81.44 [As amended by T. D. 5239, 1943 Cum. Bull. 1081; T. D. 5351, 1944 Cum. Bull. 579; T. D. 5906, 1952-1 Cum. Bull. 155] *Transfers for public, charitable, religious, etc., uses.*— Deduction may be taken of the value of all property transferred by will or by the decedent in his lifetime * * * if in either case the property was transferred (1) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes; or (2) to or for the use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *.
>
> The amount of the bequest, legacy, devise, or transfer, for which a deduction is allowable under the provisions of this section, includes the interest which falls into any such bequest, legacy, devise, or transfer, as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made (1) prior to September 1, 1944, in the case of decedent dying on or before October 21, 1942, the date of the enactment of the Revenue Act of 1942, or (2) prior to the date prescribed for the filing of the estate tax return in the case of a decedent dying after October 21, 1942. The disclaimer must not only be made (1) prior to September 1, 1944, in the case of a decedent dying on or before October 21, 1942, or (2) prior to the date prescribed for the filing of the estate tax return (including such date as may be prescribed in an extension of time

granted for the filing of such return) in the case of a decedent dying after October 21, 1942, but must be irrevocable at the time the deduction is allowed. Ordinarily, a disclaimer made by a person not under any legal disability will be considered irrevocable when filed with the probate court. A disclaimer is a complete and unqualified refusal to accept the rights to which one is entitled. Thus, if the beneficiary uses these rights for his own purposes, as by receiving a consideration for his formal disclaimer, he has not refused the rights to which he was entitled. There can be no disclaimer after an acceptance of such rights, expressly or impliedly. The disclaimer of a power described in this paragraph is to be distinguished from the release or exercise of a power. In the case of the estate of the creator of a power, the release or exercise of the power by the donee of the power in favor of a person or object described in the preceding paragraph does not cause any deduction under this section of the value of the property subject to such power. See section 81.46.

* * * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * * Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay

the principal to a charitable corporation, the present value of the remainder is deductible.

* * * *

Sec. 81.46 *Conditional bequests.*—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.